UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THOMAS J. CREAN and SUSAN CREAN, Case No. 15-cv-3814 (LTS)(HBP)

Plaintiffs,

-v-

125 WEST 76th STREET REALTY CORP., et al.,

Defendants.

---x

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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Preliminary Statement

This action was commenced by plaintiffs Thomas J. Crean ("TC") and Susan Crean (together the "Plaintiffs") against defendants 125 W. 76 Realty Corp., sued herein as 125 West 76th Street Realty Corp. (the "Co-op") and Alyson Reim Friedman ("Friedman", together with the Co-op, the "Defendants") seeking damages for alleged employment discrimination acts in violation of Title VII of the federal Civil Rights Act ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), New York State Human Rights Law ("SHRL") and New York City Human Rights Law ("CHRL"). This action is one of numerous actions that TC has commenced (and lost) against the Co-op relating to the termination of his employment, as superintendent of the Co-op, which took place on November 5, 2014. As demonstrated herein, Plaintiffs' complaint (the "Complaint") should be dismissed for a myriad of reasons. First and foremost, Susan Crean's claims must be dismissed because she does not have standing pursuant to the statutes on which the Complaint is based. To bring a claim for employment discrimination, a plaintiff must have been an employee of the defendant. It cannot be disputed that Susan Crean was never an employee of the Co-op. In any event, the Complaint must be dismissed, because the Co-op is not an "employer" within the scope of Title VII, the ADEA, ADA, SHRL or CHRL. Accordingly, the statutes upon which the Complaint is based do not apply to TC and, thus, TC's claims fail as a matter of law. Finally, TC has already had a full and fair opportunity to litigate the issues surrounding his termination. Thus, the claims asserted in the Complaint are precluded as a matter of law. For all of these reasons, it is respectfully requested that Defendants' motion be granted in its entirety, dismissing this action with prejudice.

Factual Background

The Complaint alleges violations of Title VII, the ADEA, ADA, SHRL or CHRL arising out of the Co-op's termination of TC's employment. The Co-op employed TC as the superintendent of the nine (9) story, twenty-eight (28) unit cooperative apartment building located at 125 West 76th Street, New York, New York. *See* Margolis Decl., Exhibit B, pp. 1; Exhibit C, pp. 2. TC was terminated on November 5, 2014. *See* Margolis Decl., Exhibit B (Exhibit 21 therein), Exhibit C (p. 4), and Exhibit D (p. 2).

On November 7, 2014, Local 32BJ, Service Employees International Union (the "Union") filed a request to arbitrate TC's termination on the basis that it was arbitrary and therefore violative of Article XVI of the 2014 Apartment Building Agreement (the "Agreement") between the Realty Advisory Board on Labor Relations and the Union. *See* Margolis Decl., Exhibit D, (pp. 2-3); Exhibit D. Such arbitration took place between January 6, 2015 and February 4, 2015 (the "Arbitration"). *See* Margolis Decl., Exhibit D (p. 2). Both TC and the Co-op were represented by counsel during the Arbitration, and were given "full opportunity to offer testimony, present evidence, examine and cross-examine witnesses." *See* Margolis Decl., Exhibit D (p. 3). Based on the evidence submitted at the Arbitration, including the testimony of the Co-op's witnesses and TC, the arbitrator determined that the Co-op did not violate the Agreement when it terminated TC. *See* Margolis Decl., Exhibit D (p. 12).

On or about the same date that the Union filed a request to arbitrate, TC filed a "Whistleblower Complaint", alleging retaliatory employment practices in violation of the whistleblower provisions of the Occupational Safety & Health Act of 29 U.S.C. § 660(c) and the Clean Air Act, 42 U.S.C. § 7622. *See* Margolis Decl., Exhibit A. The Whistleblower Complaint was dismissed on May 29, 2015 for the following reasons:

> The evidence shows that Respondent had planned to end its employment relationship with Complainant before he called the Department of Environmental Protection. Therefore, OSHA does not have reasonable cause to believe that Complainant's protected activity caused or was a motivating factor in Respondent's decision to terminate Complainant employment. Consequently, this complaint is dismissed.

See Margolis Decl., Exhibit F.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS

A. Standard for a Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6)

To survive a motion to dismiss, plaintiff must plead "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A pleading that merely offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do [n]or does the complaint suffice if it renders naked assertion[s] devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also id.* ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations"). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*; *Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level"); *Boykin v. KeyCorp*, 521 F.3d 202, 213 (2d Cir. 2008) (Pleader must "amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*."). A complaint that does not set forth facts sufficient to "nudg[e]" a claim "across the line from conceivable to plausible" cannot survive a motion to dismiss. *Twombly*, 550 U.S. at 570.

A plaintiff bringing a federal discrimination claim is no longer required to plead a *prima facie* case under the *McDonnell Douglas* framework which required a showing of (i) membership in a protected group; (ii) qualification for the job in question; (iii) an adverse employment action; and (iv) circumstances supporting an inference of discrimination (*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 515 (2002) (expressly holding "that an employment discrimination plaintiff need not plead a prima facie case of discrimination). However in light of *Twombly* and *Iqbal*, a complaint must at a minimum set forth allegations supporting a plausible claim of discrimination. *See Hedges v. Town of Madison*, 456 Fed.Appx. 22, 23 (2d Cir. 2012)).

Analysis of discrimination claims brought pursuant to the SHRL is to be conducted using federal standards. *Wright v. Monroe Community Hosp.*, 493 Fed.Appx. 233, 235 (2d Cir. 2012) (internal citations omitted). Dissimilarly, in 2005 the New York City Council amended the CHRL by passing the Local Civil Rights Restoration Act of 2005 (the "Restoration Act"), N.Y.C. Local L. No. 85. This amendment embodies a broader conception of discrimination than federal law and the SHRL, and thus requires that CHRL claims be analyzed independently from state and federal discrimination claims. *Smith v. Johnson*, No. 14-cv-3975; 2014 WL 5410054 at *4 (S.D.N.Y. October 24, 2014) (internal citations omitted). However, despite the more liberal construction afforded CHRL claims, a plaintiff is still required to allege enough facts to state a claim for relief under the CHRL that is plausible on its face. *Id.*

B. Standard for a Motion to Dismiss Under Fed. R. Civ. P. 12(b)(1)

An action may also be dismissed where the plaintiff lacks standing. Fed. R. Civ. P. 12(b)(1). Article III of the Constitution limits the jurisdiction of the federal courts to certain cases and controversies. An indispensable element of this requirement is that plaintiffs establish their standing to sue. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (internal citations omitted). The "irreducible constitutional minimum of standing" is composed of three requirements (i) the plaintiff must have suffered an injury in fact; (ii) there is a causal connection between the injury and conduct complained of; and (iii) it is likely, not speculative, that the injury will be redressed by a decision in the plaintiff's favor. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). An injury in fact is a legally protected interest which is concrete, particularized, and actual or imminent; a hypothetical, abstract or future injury is insufficient. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983). Likewise, the causal connection between the injury and conduct complained of must be "fairly traceable to the challenged action of the defendant." *Lujan*, 504 U.S. at 560 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)).

II. SUSAN CREAN DOES NOT HAVE STANDING TO BRING THIS ACTION

At the outset, Susan Crean's claims must be dismissed because she does not have standing under the relevant statutes. To bring a claim for employment discrimination a plaintiff must have been an employee of the defendant. *O'Connor v. Davis*, 126 F.3d 112, 115 (2d Cir. 1997). Title VII, the ADEA and ADA define an "employee," as "an individual employed by an employer." 42 U.S.C. § 2000e(f) (Title VII); 29 U.S.C. § 630(f) (ADEA); 42 U.S.C. § 12111(4) (ADA). The SHRL defines an employee as an individual not employed by his parents, spouse or child. N.Y. Exec. Law §292(6). The CHRL provides no definition at all. N.Y.C. Admin. § 8-102. However, both the SHRL and CHRL prohibit an employer from discharging from employment or discriminating against a "person" in compensation or the terms, conditions or privileges of employment. N.Y. Exec. Law § 296(1); N.Y.C. Admin. § 8-107. For purposes of these statutes, "person" can only be a reference to an employee, because an employer cannot logically discriminate against a person in the conditions or privileges of employment if no employment relationship exists. *Wang v. Phoenix Satellite Television US, Inc.*, 976 F.Supp.2d 527, 532 (S.D.N.Y. 2013).

The Second Circuit has held that a prerequisite to considering whether an individual is an employee is that the individual have been hired. *O'Connor*, 126 F.3d at 115. It is axiomatic that to have been hired, the individual must have received financial benefit for services rendered. *Id.* Without satisfaction of this "essential condition" no plausible employment relationship can be said to exist. *See e.g. York v. Assoc. of Bar of City of New York*, 286 F.3d 122, 125-126 (2d Cir. 2002); *O'Connor v. Davis*, 126 F.3d 112, 115-116 (2d Cir. 1997); *Sweeney v. Bd. of Educ. of Rocky Point Union Free Sch. Dist.*, 112 A.D.2d 240, 241 (2d Dep't 1985); *Wang*, 976 F.Supp.2d at, 532-537. Since the SHRL is to be construed using federal standards, the Second Circuit determination of whether an individual qualifies as an employee thus applies thereto. *See Wright*, 493 Fed.Appx. at 235. This district has applied the same analysis to a determination of "employee" under the CHRL. *See e.g. Wang*, 976 F.Supp.2d at 532-535.

As alleged in Plaintiffs' Complaint in this action (Margolis Decl., Exhibit A, ECF No. 1), Susan Crean is TC's wife. Notably, the Complaint does not contain a single allegation that Susan Crean is, or ever was, an employee of the Co-op or co-defendant Friedman. Moreover, there is no allegation that Susan Crean was ever hired by either defendant. In fact, the documents annexed to the Complaint plainly demonstrate that she was never employed by Friedman or the Co-op. *See e.g.* U.S. Equal Employment Opportunity Commission Dismissal and Notice of Rights addressed to Susan Crean (Margolis Decl., Exhibit A, ECF No. 1, p. 13) including handwritten notation "I am Not an Employee of Defendant & Never Was Susan Crean." Further, in their Complaint, Plaintiffs refer to TC as "Employee/Plaintiff" and Susan

Crean as "Plaintiff Wife" or simply "wife." *See* Margolis Decl., Exhibit A, ECF No. 1, pp. 3-4, §§ II(D), IV. Accordingly, Susan Crean has no standing under the statutes upon which the Complaint is based and, therefore, her claims must be dismissed. *Lujan*, 504 U.S. 555 at 560-561 (1992); *City of Los Angeles*, 461 U.S. at 101-102.

III. THE CO-OP IS NOT AN EMPLOYER WITHIN THE MEANING OF THE STATUTES UPON WHICH THE COMPLAINT IS BASED

TC brings these claims for employment discrimination pursuant to various state and federal statutes, on the premise that Defendants are his employers. The problem for TC is that neither the Co-op nor Friedman is an "employer" under the statutes upon which the claims in the Complaint are based.

TC's federal claims of employment discrimination are brought under Title VII, the ADEA, and ADA. These statutes all define an "employer" as "a person engaged in an industry affecting commerce who has **fifteen or more** employees for each working day in each of twenty or more calendar weeks in the year." 42 U.S.C. § 2000e(b); 29 U.S.C. § 630(b); 42 U.S.C. § 2322(5)(A)(emphasis added). All of these statutes also define "commerce" as "trade, traffic, commerce, transportation, transmission, or communication **among the several States; or between a State and any place outside thereof**; or with the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof." 42 U.S.C. § 2000e(g); 29 U.S.C. § 630(g). "Industry affecting commerce" is defined as "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 401 *et seq.*) and further includes any government industry, business or activity." 42 U.S.C. § 2000e(h); 29 U.S.C. § 630(h).

TC also asserts claims under the SHRL and CHRL. Both the SHRL and CHRL prohibit employers from discriminating on the basis of age, race, creed, color, national origin, sexual orientation, military status, sex, marital status or disability. N.Y. Exec. Law § 291; N.Y. City Admin. Code § 8-107. However, both statutes provide that an "employer" must have **four or more persons** in its employ. N.Y. Exec. Law § 292(5); N.Y.C. Admin. Code § 8-102(5)(emphasis added).

Neither the Co-op nor Friedman is an "employer" within these statutory definitions. The Co-op is merely an entity that owns a single cooperative apartment building. It is decidedly not engaging in an industry affecting interstate commerce. Even if by some stretch of the imagination it could be said that the Co-op is engaged in an industry affecting interstate commerce, it does not employ more than four (4) people, much less more than fifteen (15) people as provided for in the statutes upon which Plaintiffs base their claims. *See* Declaration of Pam Elgar, dated October 5, 2015, Exhibit 1, ¶ 2 ("with the exception of the fourth quarter of 2014 when the Co-op had three (3) employees, the Co-op never employed more than two (2) employees"). Thus, the Co-op is not an employer within the meaning of any of the allegedly violated statutes. 42 U.S.C. § 2000e(b); 29 U.S.C. § 630(b); 42 U.S.C. § 2322(5)(A); N.Y. Exec. Law § 292(5); N.Y.C. Admin. Code § 8-102(5). While Friedman may be deemed an agent of the Co-op in her role as Co-op president, of the allegedly violated statutes, only Title VII and the CHRL confer agency liability. 42 U.S.C. § 2000e(b); N.Y.C. Admin. Code § 8-107. However, as demonstrated above, inasmuch as those statutes are inapplicable to the Co-op, they necessarily do not apply to Friedman. For all these reasons, Defendants' motion should be granted in its entirety and the Complaint should be dismissed.

IV. THOMAS CREAN'S ACTION IS PRECLUDED

A. The Action is Barred by Res Judicata

1. The Claims Herein Arise From the Same Facts as the Claims in the Prior Proceedings

Under the doctrine of *res judicata*, a final judgment on the merits of an action precludes the parties from re-litigating issues that were or could have been raised in the action. *Austin v. Downs, Rachlin & Martin Burlington St. Johnsbury*, 270 Fed.Appx. 52, 53 (2d Cir. 2008); *Kirkland v. Peekskill*, 651 F.Supp. 1225, 1228 (S.D.N.Y. 1987). Four requirements must be satisfied for *res judicata* to apply to a case (i) a final judgment was rendered on the merits; (ii) by a decision making body of competent jurisdiction; (iii) in a case involving the same parties or their privies and (iv) involving the same cause of action. *Kiryas Joel Alliance v. Village of Kiryas Joel*, 495 Fed.Appx. 183, 186 (2d Cir. 2012) (internal citations omitted). Thus, a proper *res judicata* inquiry focuses on whether the claims in question arise from the same "nucleus of operative fact," i.e. whether the underlying facts are related in time, space, origin or motivation; form a convenient trial unit; and their treatment as a unit conforms to the parties' expectations. *Waldman v. Village of Kiryas Joel*, 207 F.3d 105, 108 (2d Cir. 2000) (internal quotations omitted). *Res judicata* applies to issues resolved in arbitration and administrative proceedings. *Barna v. Morgan*, 341 F.Supp.2d 164 (N.D.N.Y. 2004) (quoting *Kirkland*, 651 F.Supp. at 1229). Further, the idea of "final judgment" does not contemplate the full completion of the appellate process. *See* Jay Carlisle, Second Circuit 2005 Res Judicata Developments, 24 QLR 351, 353 (2006).

The claims asserted here and in prior proceedings are sufficiently related in time, space and origin as they concerned the events leading up to, and the ultimate, termination of TC by the

Co-op. *See Waldman*, 207 F.3d at 108. This common nucleus of operative facts permits Defendants to proceed with the next step of the *res judicata* analysis of TC's claims.

2. Thomas Crean Had a Full and Fair Opportunity to Litigate His Claims

For *res judicata* purposes, it does not matter whether a plaintiff actually raised his claims in a previous proceeding. *Fried v. LVI Services, Inc.*, 557 Fed.Appx. 61, 64 (2d Cir. 2014). Rather, a *res judicata* inquiry should be focused on whether the claimant had a "full and fair opportunity to litigate", and therefore could have raised his claims in the prior proceeding. *Id.*; *DuBois v. Macy's Retail Holdings, Inc.*, 533 Fed.Appx. 40 (2d Cir. 2013). If so, the claims may be properly considered part of the same cause of action as the claims made in the prior proceeding and are thus barred by *res judicata*. *See Fried*, 557 Fed.Appx. at 64. That the claims may rely upon a different legal theory or seek an alternative form of relief does not affect the analysis. *DuBois*, 533 Fed.Appx. at 41. *Res judicata* thus "constitutes an absolute bar not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Austin*, 270 Fed.Appx. at 53 (internal quotations omitted).

In *DuBois v. Macy's Retail Holdings, Inc.*, the plaintiff sought to vacate an arbitration award entered in favor of his employer. *DuBois*, 533 Fed.Appx. 40. Therein, as here, the plaintiff brought claims for discrimination and harassment on the basis of race/color, sex and national origin, as well as a claim for harassment. Declining to vacate the arbitration award, the court held that the plaintiff's claims of employment discrimination must be dismissed because the arbitration award constituted a final judgment on the merits therefore, *res judicata* precluded his claims. *Id.*, at 41.

Just as in *DuBois*, TC has had a full and fair opportunity to litigate the claims he attempts to assert here. *See* Margolis Decl., Exhibit C pp. 3. In fact, the Agreement specifically required TC to raise these claims in the Arbitration by providing that

> 23. No Discrimination.
>
> (A) There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability national origin, sex, sexual orientation, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Employment Act, 42 U.S.C. Section 1981, Family and Medical Leave Act, the New York State Human Rights Law, the New York City Human Rights Code, or any other similar laws, rules or regulations. **All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as sole and exclusive remedy for violations.** Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

See Margolis Decl, Exhibit E. Emphasis added.

The fact that the claims in the Arbitration more centrally dealt with other violations of the Agreement, while the claims here are brought specifically pursuant to Title VII, the ADEA, ADA, SHRL and CHRL, is of no moment. *DuBois*, 533 Fed.Appx. at 41. TC could have, should have and was required to raise the Title VII, ADEA, ADA, SHRL and CHRL claims in the Arbitration. *See* Margolis Decl, Exhibit E. Thus, he had a full and fair opportunity to litigate them in the Arbitration. *Fried*, 557 Fed.Appx. at 64; *DuBois*, 533 Fed.Appx. at 41; *Waldman*, 207 F.3d at 108. Accordingly, TC's claims are barred by *res judicata*.

B. The Action is Barred by Collateral Estoppel

Similar to the *res judicata* principle of claim preclusion, is the principle of issue preclusion, known as collateral estoppel. Collateral estoppel bars a party from re-litigating an issue decisive of the present action that was previously decided against him in a prior action in which he had a full and fair opportunity to litigate that point. *Austin*, 270 Fed.Appx. at 53-54.

The prior decision need not have been explicit on the point, because if it is "by necessary implication ... contained in that which [was] explicitly decided," it will be the basis for collateral estoppel. *Fuchsberg & Fuchsberg v. Galizia*, 300 F.3d 105, 108 (2d Cir. 2002) (internal citations omitted). Collateral estoppel applies to issues resolved in arbitration and administrative proceedings, assuming there has been a final determination on the merits, notwithstanding a lack of confirmation of the award. *Jacobson v. Fireman's Fund Insurance Co.*, 111 F.3d 261, 267-68 (2d Cir. 1997) (internal citations omitted).

While the party seeking the benefit of collateral estoppel must prove the identity of the issues, and the challenger must demonstrate that he did not have a full and fair opportunity to litigate them, no rigid rules are possible in a collateral estoppel analysis. *Weizmann Institute of Science v. Neschis*, 421 F.Supp.2d 654, 675 (S.D.N.Y. 2005). The fundamental inquiry for the court is whether re-litigation should be permitted in a particular case in light of (i) fairness to the parties; (ii) conservation of judicial and litigants' resources; and (iii) society's interest in consistent and accurate judicial results. *Id.*

The discrimination issues raised here arise out of the same incidents resolved in the prior proceedings -- TC's termination -- and share the same nucleus of fact. *See Fuchsberg*, 300 F.3d at 108; *accord Weizmann Institute of Science*, 421 F.Supp. at 676. Specifically, in finding in favor of the Co-op in the Arbitration, the arbitrator validated that TC's difficulty in cooperating with Co-op management, his continued written threats and posting of unauthorized notices in the building, and his ultimate preventing of contractors from proceeding with work at the Co-op, all led to the justified termination of his employment by the Co-op. *See* Margolis Decl., Exhibit D (pp. 11-13). These legitimate bases for termination necessarily undermine and belie any conclusion that any form of discrimination contributed to the Co-op's decision to terminate TC. For these reasons, collateral estoppel should bar TC's claims.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that this Court grant their motion to dismiss the Complaint in its entirety and with prejudice and grant such other and further relief as this Court deems just and proper.

Dated: New York, New York
October 5, 2015

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